

ENDORSED
FILED
ALAMEDA COUNTY
OCT 12 2006

CLERK OF THE SUPERIOR COURT
By SARA DALLESSKE
Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

CENTER FOR BIOLOGICAL
DIVERSITY, INC., PETER GALVIN,

Plaintiffs,

vs.

FPL GROUP, INC., et al.

Defendants.

No. RG04-183113

ORDER GRANTING MOTIONS
FOR JUDGMENT ON THE
PLEADINGS

Two motions came on for hearing in this action on September 20, 2006, in Department 512 of the above-entitled Court, the Honorable Bonnie Sabraw presiding: (1) the Renewed Motion of Defendants GREP Bay Area Holdings, LLC; enXco, Inc.; SeaWest WindPower, Inc.; Pacific Winds, Inc.; WindWorks, Inc.; Altamont Winds, Inc. (jointly, "GREP Defendants") for Partial Judgment on the Pleadings, as to the First through Ninth Causes of Action of the First Amended Complaint (all for violations of the California Unfair Competition Law ("UCL")) and (2) the Motion of Defendants FPL Group, Inc., FPL Energy LLC, ESI Bay

Area, Inc., Greenridge Power, LLC, and Altamont Power, LLC (jointly, "FPL Defendants") for Judgment on the Pleadings, as to the Tenth Cause of Action (entitled Destruction of Public Trust Natural Resources). Each set of Defendants sought leave to join in the other parties' motion.

GREP Defendants appeared by George T. Kaplan and Kristopher S. Davis. FPL Defendants appeared by William S. Berland. Plaintiffs Center for Biological Diversity and Peter Galvin ("Plaintiffs") appeared by Richard R. Wiebe.

The Court has considered all the papers filed on behalf of the parties, as well as the arguments presented at the hearing, and, good cause appearing, hereby GRANTS both motions, as follows.

I. PROCEDURAL BACKGROUND

In the original complaint in this action, filed on November 1, 2004, Plaintiffs brought nine causes of action, all for violations of the UCL. Plaintiffs challenge Defendants' activities in owning and operating energy-producing wind turbines in the Altamont Pass, alleging that the turbines have for several years been killing and injuring thousands of wild birds migrating through the area: eagles, hawks, falcons and owls. Plaintiffs claim that the killing of the wildlife is in violation of numerous provisions of the California Fish and Game Code, as well as federal laws protecting eagles and migratory birds. Each UCL cause of action asserted a different statute under which Defendants' actions were alleged to be unlawful. Plaintiffs brought the complaint on behalf of themselves, the members of Plaintiff Center for Biological Diversity, and the general public. Plaintiffs

sought declaratory relief, restitution, and imposition of statutory fines and penalties.

On November 2, 2004, the day after the complaint was filed, the voters of this state passed Proposition 64, amending the UCL to impose a standing requirement on all private parties pursuing claims under the UCL, providing that a private plaintiff cannot bring an action on behalf of the general public, but rather must have "suffered injury in fact" and "lost money or property". Business & Profession Code §17204.¹ GREP Defendants demurred to each of the nine UCL causes of action on the grounds that each failed to state facts sufficient to constitute a cause of action because Plaintiffs did not, and could not, satisfy the standing requirement of Proposition 64. FPL Defendants joined in the demurrer, and filed its own motion to strike the relief sought by Plaintiffs. GREP Defendants joined in the motion to strike.

In February 2005, the demurrer was heard in this Court's Complex Litigation Department (Department 22, the Hon. Ronald M. Sabraw), in conjunction with demurrers and motions for judgment on the pleadings in several other cases. All of these motions and demurrers focused primarily on the issue of whether the new standing requirements of Proposition 64 should be applied retroactively. The Court determined that Proposition 64 precluded private persons who had filed UCL claims on behalf of the general public prior to November 2,

¹ All statutory references hereafter are to the Business & Professions Code unless otherwise indicated.

2004, from continuing to litigate those claims on behalf of the general public after the election. See February 17, 2005 Order issued by Judge Ronald M. Sabraw ("February 2005 Order").

The Court, after making its decision as to the general effect of Proposition 64 on cases that had been filed before the election, then ruled on the specific demurrers and motions in each of the cases before it. In applying its decision to the instant action, the Court ruled that, while Plaintiffs' claims brought on behalf of the general public could not proceed, the named Plaintiffs could continue individually to litigate the UCL claims in their own interest. (February 2005 Order at 35.) The Court found that the wildlife at issue in this case is part of the public trust, which the state holds for the benefit of the people, and that Plaintiffs had sufficiently alleged an actual injury to property held in trust to satisfy the standing requirement of section 17204. *Id.* The Court went on to say that its order did not preclude Defendants from raising the standing issue on a motion for summary judgment or otherwise. *Id.*

Some weeks later, after further briefing and another hearing, the Court ruled on Defendants' motion to strike certain of the prayers for relief from the complaint. See March 24, 2005 Order issued by Judge Ronald M. Sabraw ("March 2005 Order"). The motion to strike was denied as to Plaintiffs' prayer for declaratory relief, but granted as to their prayer for imposition of fines and penalties, and their prayer for restitution.

Plaintiffs asserted, *inter alia*, that they should be permitted to seek restitution based on the value of the wild birds that had been killed by Defendants. The Court noted that, under *Korea Supply v. Lockheed Martin* (2003) 29 Cal.4th 1134, 1150, restitution under §17203 could only be awarded for “quantifiable” sums owed by Defendants to Plaintiffs, and that “there must be a *res*, an ‘identifiable kind of property or entitlement in defendants’ hands.’” (March 2005 Order at 3.) The Court ruled that no such property or entitlement existed on the facts alleged here, holding that the Court could not order Defendants to provide monetary relief based on the value of the birds that had been injured or killed because Plaintiffs “never had any ownership in the birds in the sense of private property, so the value was not taken from them personally”. *Id.* The Court concluded that the Plaintiffs do not, either as individuals or through the public trust, have a proprietary interest in the wild birds that equates to an ownership interest in property that would support an order under §17203 directing Defendants to restore to Plaintiffs the value of the property (the birds) that was acquired (killed or injured) by the alleged unlawful practices. *Id.* at 5.

The Court noted that that it reached a different conclusion as to the sufficiency of Plaintiff’s property interest for purposes of restitution under §17203 in the March 2005 Order than it had reached for purposes of standing under §17204 in its February 2005 Order:

The Order of February 17, 2005, held that by alleging a loss of wildlife that was held in trust for them the Plaintiffs had alleged a loss of “money or property” and had standing under section 17204. That order did not

address the nature of the property interest. This [March 2005] Order addresses the nature of the property interest and holds that although members of the public have a property interest in the public's power to control and regulate wildlife, they do not have a property interest in wildlife in the sense of private "ownership" of property. Therefore, Plaintiffs may pursue an action under the UCL because they have lost a property interest (control over the wild birds) but the Court may not award monetary relief under the UCL because restoring control involves injunctive (not monetary) relief and Plaintiffs never had a proprietary ownership interest in the wild birds. (March 2005 Order at 6:5-16).

At the conclusion of its March 2005 Order, the Court granted leave to amend to add a cause of action under the public trust doctrine, and a prayer for injunctive relief.

Plaintiffs filed a First Amended Complaint on April 15, 2005, adding a Tenth Cause of Action for "Destruction of Public Trust Natural Resources", and adding prayers for injunctive relief. Defendants filed a motion to strike the prayers for relief, which motion was denied, but did not challenge the Tenth Cause of Action at that time.

In March 2006, the action was transferred from the Complex Litigation Department to the instant department, which is assigned all California Environmental Quality Act ("CEQA") cases brought in Alameda County. The transfer was made so that a single judge could manage both this action and two other actions which were brought under CEQA and concerned the same Altamont Pass wind turbines at issue here. The CEQA actions named Defendants in this action as real parties in interest.

II. MOTION FOR JUDGMENT ON THE PLEADINGS RE UCL CLAIMS

The GREP Defendants now seek to “renew” their demurrer on the UCL standing issue, by filing this Renewed Motion for Partial Judgment on the Pleadings. They request the Court revisit the issue they raised in their original demurrer: i.e., that Plaintiffs cannot state UCL claims because they do not have the standing required under §17204. While the first demurrer focused primarily on the issue of retroactivity of Proposition 64 on claims brought on behalf of the public, the moving papers here focus on the argument that Plaintiffs cannot, as individuals, allege that they have suffered an actual injury and loss of money or property, a necessary element of standing after Proposition 64. Before addressing the merits of the arguments, the Court must decide whether to consider the renewed motion.

A. *Renewal of Motion is Appropriate*

Defendants, whose original demurrer was denied, are now asking the Court to reconsider the denial based upon new law; two recent opinions interpreting Proposition 64, *Pfizer Inc. v. Superior Court* (2006) 141 Cal.App.4th 290 (“*Pfizer*”) and *California for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223 (“*Mervyn's*”). Defendants complied with C.C.P. §1008 in filing their renewed motion, providing a declaration by counsel as to what application was made before, when, and to what judge,² what order was made, and identifying the new

² Neither party has objected to the renewed motion being heard by a judge different than the one that heard the original motion.

case law on which Defendants base the request for review. Defendants point to these two new opinions as requiring a strict interpretation of Proposition 64's restrictions on claims brought by private individuals, even though such interpretations could dramatically restrict private enforcement of the UCL (*Pfizer*, at 307) and would preclude standing based on abstract interests previously sufficient (*Mervyn's*, at 233.) The analysis applied in both opinions also points out the need to interpret the statute by looking to the voter's intent.

In February 2005, at the time the Court ruled on the original demurrer, there were no Supreme Court decisions interpreting Proposition 64. There were also no published appellate court decisions dealing with the amended standing provision beyond the issue of its retroactivity. The Court did an extensive analysis concerning voter's intent in the portion of its March 2005 order addressing the applicability of Proposition 64 to cases filed before the election. A similar analysis, however, was not applied in the section concerning Plaintiffs' standing as individuals who alleged a property loss. This analysis was based on pre-Proposition 64 cases. Moreover, when the Court determined that §17204 standing could be based on an abstract property interest; i.e., Plaintiff's "interest in the public's power to control and regulate wildlife," it did so without the benefit of the Supreme Court's conclusion that "abstract interests" were not sufficient for such standing. See *Mervyn's*, at 233.

The Court finds that *Pfizer* and *Mervyn's* represent new law pertinent to the original demurrer, and that Defendants' request for the Court's renewed

consideration of the standing issue is appropriate under C.C.P. §1008. To the extent that this non-statutory motion for judgment on the pleadings is restricted by C.C.P. §438, the Court also finds that the two new cases represent a material change in applicable case law.

B. Motion for Judgment on the Pleadings of the UCL claims is granted on the merits.

(1) New UCL Standing Requirement under Proposition 64

Proposition 64 amended Section 17204 to read, “Actions for any relief pursuant to this chapter shall be prosecuted exclusively . . . by any person who has suffered injury in fact and has lost money or property as a result of such unfair competition.”

As directed by *People v. Canty* (2004), 32 Cal. 4th 1266, 1276-1277, the Court interprets Proposition 64 using the same principles that govern the construction of a statute. The Court first examines the language of the proposition and gives the words their usual, ordinary meaning. If the language is clear and unambiguous, the Court follows the plain meaning of the measure. This “plain meaning” rule does not, however, prohibit a Court from examining whether the literal meaning of a measure comports with its purpose. The language is construed in the context of the measure as a whole. The intent of the law prevails over the letter of the law and the letter will, if possible, be read to conform to the spirit of the act. The Court also considers the “Findings and Declaration of Purpose” in the

Proposition, and the voter information guide.³ *People v. Canty, supra* at 1280; *Hayward Area Planning Assn. v. Alameda County Transportation* (1999) 72 Cal. App. 4th 95, 104-105.

Proposition 64 was promoted as adding a standing requirement to the UCL. *Pfizer* at 307. This Court must decide what is meant by the new standing provision in section 17204, requiring that private parties must have suffered “injury in fact and loss of money and property”. Does the new provision require actual, compensable, loss of money or property? The Court concludes that it does.

In reaching this conclusion, the Court considers the language in section 17204 in the context of the measure as a whole and finds that there is some inconsistency in the plain language of the Proposition. In the “Findings and Declarations of Purpose”, Proposition 64 states, in section 1(e), that the intent of the voters is to restrict standing to those individuals “injured in fact under the standing requirements of the United States Constitution”. Section 3 of the Proposition, however, in amending section 17204, provides that a private individual only has standing if he or she has suffered an injury in fact “and has lost money or property”.

The reference to the United States Constitution and the requirement of “injury in fact” in the Finding and Declarations could be interpreted as only requiring the minimum Constitutional standing for individual claims; that is, an

³ The Court grants Defendants’ Request for Judicial Notice as to Exhibit F, contents of Official Voter Information Guide, and Exhibit G, text of Proposition 64.

actual or imminent invasion of a concrete and particularized legally protected interest. See *Lujan v. Defenders of Wildlife* (1992) 504 U.S. 555, 560. Such an interpretation, however, would negate the new language added to section 17204 requiring that the only private party who may bring a claim is one “who has suffered injury in fact and has lost money or property as a result of such unfair competition.” (emphasis added). It is a maxim of statutory construction that courts should give meaning to every word of a statute if possible, and avoid a construction making any word surplusage. *Reno v. Baird* (1998) 18 Cal.4th 640, 658.

In addition, the official summary and the ballot materials refer repeatedly to loss of money or property,⁴ so the Court is inclined to presume that the electorate intended to give effect to that phrase. See *McLaughlin v. State Bd. of Education* (1999) 75 Cal. App. 4th 196, 214. On the other hand, the ballot materials never mention “Constitutional standing”. The Court is reluctant to presume that any significant portion of the electorate understood or could define “the standing requirements of the United States Constitution.”

The Court next turns to whether the “loss of money or property” needed for standing under §17204 should be interpreted the same as the “lost money or

⁴ See, e.g., Voter Information Guide for Proposition 64, at p. 38, stating that Proposition 64 would limit suits by private individuals to those who were “actually injured by, and suffered financial/property loss” (from “Official Title and Summary”); that it would prohibit any person other than the Attorney general and local public prosecutors from bringing a suit “unless the person suffered injury and lost money or property” (from “Analysis by Legislative Analysts”).

property” that the Court may order restored under §17203. The Court concludes that it should. This interpretation gives effect to the plain language of a statute, and makes the standing language in section 17204 (“Actions for any relief pursuant to this chapter shall be prosecuted ... by any person who ... has suffered injury in fact and has lost money or property as a result of such unfair competition”) consistent with the scope of relief language in section 17203 (“The court may make such orders or judgments ... as may be necessary ... to restore to any person an interest in any money or property ... which may have been acquired by means of such unfair competition”).

In addition, the effect of interpreting “loss of property” in §17204 as having a broader meaning for standing purposes than the “lost property” that could be restored under §17203 would be a half measure that would neither reflect the language in §17204 nor reflect the more limited Constitutional “injury in fact” standard section 1(e) of Proposition 64. Such an interpretation lacks clarity, because it would require judicial definition of a standard that would be based on neither the plain language of the statute nor the body of federal law on Constitutional standing—essentially staking out some undefined middle ground. It would also open the possibility that a plaintiff can have “lost ... property as a result of ... unfair competition” under section 17204, but the Court might be unable, under section 17203, to restore to that plaintiff the “property” that was lost. This would be a peculiar result.

Further, the California Supreme Court has noted that, while “abstract interests” previously provided standing for a private party to bring a UCL claim, that changed with the passage of Proposition 64. See *Mervyn’s* at 233.

Interpreting §17204 to allow for standing based on loss of a property interest not concrete enough to suffice for a claim of restitution would mean permitting standing to be based on a non-concrete, abstract interest. While this requirement of actual loss of money or property may well dramatically restrict the private enforcement of statutes intended to protect the public, that is the effect of Proposition 64, and this Court “must take the statutory language as it finds it.” *Pfizer*, at 307. After Proposition 64, enforcement of such statutes in legitimate cases is increasingly the responsibility of vigilant state agencies. *Id.*

(2) Application of the UCL Standing Requirement to the Instant Case

The Court has previously ruled that the “property interest” that Plaintiffs hold in the wild birds at issue here, via the public trust doctrine, is an interest in the public’s power to control and regulate wildlife. It is not a property interest in the sense of private “ownership” of the wildlife and, therefore, Plaintiffs have not alleged sufficient property interest for restitution under §17203. (See March 2005 Order at 6.) This Court sees no reason to change that conclusion.

Since loss of the power or right to control wildlife is, at most, loss of an abstract interest owned commonly by all members of the public, and not loss of property owned by Plaintiffs individually that would potentially allow this Court to order restitution, this Court finds that Plaintiffs do not have standing to bring

the UCL claims alleged in this action. Defendants' Motion for Judgment on the Pleadings is GRANTED as to the First through Ninth Causes of Action.

As to GREP Defendants' Request for Judicial Notice in support of this motion: the Request is GRANTED only as to Exhibit F, contents of Official Voter Information Guide, and Exhibit G, text of Proposition 64. The Court DENIES the Request as to Exhibit A (newspaper article) as inappropriate for judicial notice, and as to Exhibits H and I (text of proposed legislation and Assembly Committee report on that legislation) because the materials are irrelevant to this motion. See *People v. Mendoza* (2000) 23 Cal.4th 896 (unpassed legislation has little value as evidence of legislative intent).

The request of FPL Defendants to join in this motion is GRANTED.

III. MOTION FOR JUDGMENT ON THE PLEADINGS RE TENTH CAUSE OF ACTION

The First Amended Complaint ("FAC") includes a Tenth Cause of Action, for "Destruction of Public Trust Natural Resources." In that cause of action, Plaintiffs assert a claim based on the allegations that the wild birds are public trust resources held in trust for the people of the state, that the Defendants are killing the birds through their operation of the wind turbines, and that Plaintiffs individually and the members of the public are being irreparably injured by the destruction of this public trust resource. See FAC at ¶¶134-138. FPL Defendants move for judgment on the pleadings on the ground that this claim does not state a cause of action. The motion is GRANTED.

No statutory or common law authority supports a cause of action by a private party for violation of the public trust doctrine arising from the destruction of wild animals. Plaintiffs have not cited to any authority in which a court of this state has approved such a cause of action. Although the California Supreme Court has held that “any member of the general public has standing to raise a claim of harm to the public trust” (*National Audubon Society v. Superior Court of Alpine County* (1983) 33 Cal.3d 419, 431 n.11), the Supreme Court made that holding in a case in which it defined the public trust doctrine in terms of water and waterways, arising from the state’s right to regulate, control, and preserve tidal waters, the lands uncovered by such waters, and navigable lakes and streams (*id.* at 433-435). In *National Audubon Society*, the Supreme Court did discuss the impact of the diversion of water from non-navigable streams on various wildlife living in Mono Lake. That Court, however, found that the public trust doctrine provided a legal basis for challenging the water diversions not based on the wildlife being public trust resources, but on the fact that the diversions would impact the navigable waters of the lake itself. *Id.* at 435-437.

Later cases are in accord. Appellate courts have refused to expand the use of the public trust doctrine by private parties beyond the traditional public trust interest in navigable and tidal waters and tidelands. See *Golden Feather Community Association v. Thermalito Irrigation District* (1989) 209 Cal.App.3d 1276 (affirming a trial court’s dismissal of a private party’s public trust doctrine

claim because the claim did not arise from tidelands or navigable waters, even though plaintiff alleged impact on wild birds and fishing).

The cases on which Plaintiffs rely to support their position that wildlife is public trust property, the loss of which can serve as the basis for a cause of action by any member of the public, are all cases brought by the state or governmental parties, using their police power to regulate, protect, or conserve wildlife, not by private individuals. See, e.g., *People v. Truckee Lumber Co.* (1897) 116 Cal. 397, 399-400:

The fish within our waters constitute the most important constituent of that species of property commonly designated as wild game, the general right and ownership of which is in the people of the state [citation] as in England it was in the king; and the right and power to protect and preserve such property for the common use and benefit is one of the recognized prerogatives of the sovereign, coming to us from the common law, and preserved and expressly provided for by the statutes of this and every other state of the Union (emphasis added).

See also, e.g., *People v. Harbor Hut Restaurant* (1983) 14 Cal.App.3d 1151;

People v. Monterey Fish Products (1925) 195 Cal. 548, 563; *People v. Stafford Packing* (1924) 193 Cal. 719.

Nor is Plaintiffs' argument supported by their references to the Fish & Game Code sections describing wildlife as the "property of the people". (Fish & Game Code §1600; also Fish & Game §§ 711.7 and 1802 (department is trustee of wildlife resources for the people of the state).) While the Fish & Game Code affirms that it is the policy of this state to conserve its natural resources and to prevent the willful or negligent destruction of wild birds, the statute requires that

any claims for damages for such destruction be brought in the name of the people of the state—not by a private individual. Fish & Game Code §2014.

Defendants' Motion for Judgment on the Pleadings on the Tenth Cause of Action is GRANTED.

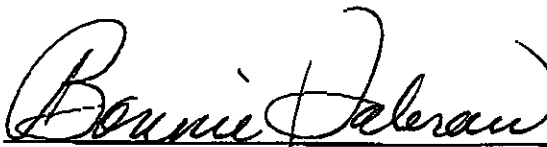
The request of GREP Defendants to join in this motion is GRANTED.

IV. DISMISSAL OF ACTION

For the reasons set forth above, Defendants Motions for Judgment on the Pleadings are GRANTED as to all of the causes of action in the First Amended Complaint. Because, as a matter of law, Plaintiffs cannot, based on Defendants' injury or destruction of the wild birds at issue here, amend the pleadings to state a loss of property providing standing to bring a UCL claim, or to state a private right of action under the public trust doctrine, the Court does not grant leave to amend.

The action is hereby DISMISSED.

10/12/06
Date


Bonnie Sabraw
Judge of the Superior Court